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No. 01-1462

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

ROSS B. LINNEEN AND
KIM ANN LINNEEN,

Petitioners,

v.

GILA RIVER INDIAN COMMUNITY,
MARY THOMAS, GOVERNOR OF THE GILA RIVER INDIAN COMMUNITY, IN HER OFFICIAL CAPACITY, AND
RALPH ANDREWS, GILA RIVER TRIBAL RANGER, IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

This is a case about Indian tribal sovereign immunity. Petitioners want to sue respondents, the Gila River Indian Community and two of its officials, for $8 million in damages. Under well-settled law, which the lower courts correctly applied, such a lawsuit is barred by tribal sovereign immunity unless (1) Congress has abrogated, or (2) the Tribe itself has waived, such immunity. Petitioners do not contend that either of these exceptions applies here, or that the decision below conflicts with this Court's precedents or the precedents of other circuits. Rather, petitioners mount a frontal attack on tribal sovereign immunity itself, essentially inviting this Court to

overturn almost a century of its own precedent recognizing such immunity. The problem for petitioners is that this Court declined precisely such an invitation just four Terms ago, in *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 760 (1998), stressing that "we decline to revisit our case law and choose to defer to Congress" with respect to the abrogation of tribal sovereign immunity. Petitioners may not like that rule, but they provide no reason for this Court to abandon it. Accordingly, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Because this case was dismissed on the pleadings on sovereign immunity grounds, the facts alleged in the complaint must be taken as true. *See, e.g., Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992, 995 n.1 (2002).

On January 1, 1996, petitioners drove onto property belonging to respondent Gila River Indian Community (the "Community") in the desert south of Chandler, Arizona. Pet. App. 8a. After they were sighted by a law enforcement officer with the federal Bureau of Indian Affairs, respondent Ralph Andrews (a tribal ranger) was dispatched to investigate. *Id.* Petitioners contend that Andrews held them at gunpoint for about three hours while haranguing them on a variety of topics, before citing them for trespassing and releasing them on their own recognizance. *Id.*

Almost exactly two years later, on December 31, 1997, petitioners filed a complaint in the U.S. District Court for the District of Arizona. That complaint named not only the three respondents here (the Community, Mary Thomas, Governor of the Community, and Andrews, the tribal ranger), but also the United States of America, the United States Department of the Interior, the Bureau of Indian Affairs, and Buddy Shapp, the officer from the Bureau of Indian Affairs who had first spotted petitioners on tribal land. The complaint alleged six federal and state causes of action, and sought $8 million in damages, plus attorneys' fees and costs. Pet. App. 3a.

The district court (Strand, J.) dismissed plaintiffs' claims against respondents on sovereign immunity grounds. The court began by noting the rule that Indian tribes, as sovereign entities, are generally immune from suit. Pet. App. 10a. The court then rejected petitioners' argument that the rule did not apply here because the Community had waived its sovereign immunity. *Id.* In particular, the court held that a "sue and be sued" provision in the Community's corporate charter was not a waiver of sovereign immunity with respect to the conduct challenged here. *Id.* at 11a. Accordingly, the court held that petitioners' claims against the Community, and respondents Thomas and Andrews in their official capacities, were barred by sovereign immunity.[1]

Petitioners appealed the district court's dismissal of their claims against the Community, as well as their claims against respondents Thomas and Andrews in their official capacities, and the Ninth Circuit affirmed. As the court explained, "[b]ecause [petitioners'] suit against the Community and against Thomas and Andrews in their official capacities is a suit against the tribe, it is barred by tribal sovereign immunity unless that immunity has been [1] abrogated or [2] waived." Pet. App. 4a.

The Ninth Circuit first noted that "the suit arises from defendant Andrews' alleged misconduct during his official duties as a tribal ranger on the Community's land," and held that "Congress has not abrogated tribal sovereign immunity for such acts committed on tribal land by a tribal officer." *Id.* at 5a.

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[1] The court also ruled that the claims against respondent Andrews in his *individual* capacity were barred by petitioners' failure to exhaust tribal remedies, and that the claims against the federal defendants were barred by petitioners' failure to exhaust remedies under the Federal Tort Claims Act, 28 U.S.C. § 2675(a). Pet. App. 12a-13a. Those rulings were not appealed to the Ninth Circuit, and are not implicated here.

The Ninth Circuit then held that petitioners "have not shown that the Community has waived its immunity" with respect to the challenged conduct. *Id.* Like the district court, the Ninth Circuit rejected petitioners' argument that the tribe had waived its immunity by including a "sue and be sued" clause in its corporate charter, explaining that such clauses "waive immunity with respect to a tribe's corporate activities, but not with respect to its governmental activities." *Id.* at 5a-6a. This case, the court explained, implicates the Community's sovereign immunity as a governmental entity under 25 U.S.C. § 476, because "the alleged actions that form the basis of this suit are clearly governmental rather than corporate in nature." *Id.* at 6a.

Because the Community's tribal sovereign immunity had been neither abrogated nor waived, the Ninth Circuit affirmed the judgment dismissing petitioners' claims against respondents. *Id.* Petitioners now seek review of that decision.

REASONS FOR DENYING THE WRIT

THE LOWER COURTS CORRECTLY APPLIED SETTLED LAW.

This case involves nothing more than the application of settled law to fact, and petitioners do not even allege that the decision below conflicts with the precedents of either this Court or other circuits. Indeed, petitioners have now abandoned their primary argument below: that the tribe waived its sovereign immunity by including a "sue and be sued" clause in its corporate charter. *See* Pet. App. 5a-6a, 10a-12a. Instead of trying to fit this case within settled law, petitioners invite this Court to announce a new "rule" that "tribal sovereign immunity [should] be limited to the extent necessary to provide Petitioners with an opportunity and a mechanism for seeking redress for the violation of their fundamental civil liberties." Pet. i. Because that "rule" has no basis in principle or precedent, this Court should decline the invitation.

Petitioners proffer a single case, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in support of their proposed "rule," but that case is wholly inapposite. At issue there were Indian tribes' attempts to exercise criminal *jurisdiction* over non-Indians for crimes committed on the reservation. *See id.* at 194-95. This Court rejected those attempts, holding that Indian tribes had accepted inherent limitations on their ability to exercise their "*powers*" over non-Indians when they were incorporated into the United States. *Id.* at 209 (emphasis added). Accordingly, "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." *Id.* at 212.

Here, in sharp contrast, there is no issue of a tribe attempting to exercise any "powers" over non-Indians. To the contrary, the issue here is whether non-Indians can attempt to exercise power over the tribe and its officials by haling them into federal court to defend against the imposition of millions of dollars in monetary damages. The scope of a tribe's powers over non-Indians is simply not coextensive with the scope of the tribe's sovereign immunity. Thus, the fact that the Community could not criminally try and punish petitioners for trespassing on tribal lands, *see id.*, in no way establishes that petitioners are free to sue the tribe for money damages in federal court.

Indeed, this Court recently underscored that point in *Kiowa,* holding that a tribe enjoyed sovereign immunity from suit on a promissory note (regardless of whether the note was signed on or off the reservation), notwithstanding the fact that the note involved the tribe's commercial activities. 523 U.S. at 755-56. The Court conceded that the State was entitled to regulate the tribe's off-reservation commercial conduct, but emphasized that "[t]o say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit." *Id.* at 755. To the contrary, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id.*

The *Kiowa* Court acknowledged that Indian tribal sovereign immunity, especially as applied (as in *Kiowa* itself) to a tribe's

off-reservation commercial activity, was subject to criticism. *See id.* at 758-59. But the Court held that any decisions regarding the abrogation of such immunity were best left to Congress, which "is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id.* at 759. Indeed, the *Kiowa* Court emphasized, "Congress 'has occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with such tribal immunity or to limit it.'" *Id.* (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991)).

Petitioners assert that they "do not ask this Court to overrule *Kiowa* or any other prior case," and "do not even ask this Court to limit the application of *Kiowa* to its facts." Pet. 8. But they are asking this Court to do precisely what it declined to do in *Kiowa*: to get into the inherently political process of line-drawing with respect to the scope of tribal sovereign immunity, a process for which Congress is both better equipped and better suited.[2]

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[2] Indeed, Congress has addressed tribal sovereign immunity on many occasions since *Kiowa*. In the 105th Congress (which was in session when *Kiowa* was decided), the Senate alone considered no fewer than seven bills on this topic. *See* S. 1691, 105th Cong. (1998), S. 2097, 105th Cong. (1998), S. 2298, 105th Cong. (1998), S. 2299, 105th Cong. (1998), S. 2300, 105th Cong. (1998), S. 2301, 105th Cong. (1998), S. 2302, 105th Cong. (1998); *see generally* Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 Am. Indian L. Rev. 309, 324-55 (2000) (discussing these legislative efforts). Rather than abrogating tribal sovereign immunity for off-reservation commercial activity in light of *Kiowa*, Congress ultimately passed a law that requires tribes to include language in certain contracts alerting contracting parties to tribal sovereign immunity. *See* 25 U.S.C. § 81. And Congress expressed its interest in continuing to monitor the issue closely by enacting another law that requires the Secretary of the Interior to submit an annual report with legislative recommendations to "achieve the purpose of providing relief to persons who are injured as a result of an official action of a tribal government." 25 U.S.C. § 450f note.

Petitioners insist, however, that they only seek to abrogate tribal sovereign immunity from lawsuits alleging violations of "fundamental civil liberties," and "do not seek to limit the tribe's legitimate exercise of local, self-government power." Pet. 8. But petitioners seek to impose liability on the Community based on the official conduct of a tribal ranger on tribal land. If anything, the case for sovereign immunity here is far *stronger* than in *Kiowa*. Law enforcement is a quintessentially sovereign function, *see, e.g., Printz v. United States*, 521 U.S. 898, 931-35 (1997), and the official conduct of a tribal ranger on tribal land is accordingly much closer to the core of tribal sovereignty than the off-reservation commercial activity at issue in *Kiowa*.

Petitioners' proposed "rule" abrogating tribal sovereign immunity for civil-rights claims is also squarely inconsistent with *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). There, this Court (per Justice Marshall) held that tribal sovereign immunity barred a civil-rights suit by a woman challenging a tribal law that denied tribal membership to children of female members who married outside the tribe but extended such membership to children of male members who married outside the tribe. *See id.* at 58-59. Petitioners' assertion that *Santa Clara Pueblo* involved a "*legitimate* exercise of local, self-government power," Pet. 8 (emphasis added) merely begs the question. Because the whole point of a civil-rights lawsuit is to determine whether a challenged exercise of government power is indeed "legitimate," petitioners would have the sovereign immunity issue turn on the ultimate outcome of the case. But the whole point of immunity, in turn, is to shield the government and its officials from having to face liability in court for their official conduct at all. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Thus, an allegation of official wrongdoing is not a reason to *abrogate* sovereign immunity, but the very predicate for the invocation of such immunity in the first place.

Finding no haven in the law, petitioners finally seek refuge in rhetoric. "This Court, not Congress, stands as the watchman on the walls of freedom. And this Court, not Congress, should protect Petitioners' fundamental civil liberties now." Pet. 7-8. There is profound irony in these words. This Court long ago held that the fundamental protections of the Bill of Rights are not applicable as against Indian tribes or their officials. *See, e.g., Talton v. Mayes*, 163 U.S. 376 (1896). Congress responded to that situation by enacting the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03, which *by statute* "acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo*, 436 U.S. at 57. Thus, petitioners' assertion that "[w]hen it comes to fundamental civil liberties, the legislative process is not just irrelevant, it is dangerous," Pet. 7, turns both law and history upside down.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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